

1992

Douglas Bailey, Plaintiff/Appellant, v. W.H. Burt
Explosives, Inc., a New Mexico corporation,
Defendant/Respondent : Brief of Respondent

Utah Court of Appeals

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Robert H. Copier; Attorney for Plaintiff/Appellant.

Roger P. Christensen; Stacey L. Hayden; Christensen, Jensen & Powell; Attorneys for Defendant/Respondent.

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DOCKET NO. 920819-CA

Case No. 920819-CA
Priority No. 15

The Honorable Boyd Bunnell, Presiding

BRIEF OF RESPONDENT W.H. BURT EXPLOSIVES, INC.

Roger P. Christensen, #0648
Stacey L. Hayden, #6567
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, UT 84101
Telephone: (801) 355-3431

Attorneys for Defendant/Respondent
W.H. Burt Explosives, Inc.

Robert H. Copier
Attorney at Law
243 East 400 South, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 531-0099

Attorney for Plaintiff/Appellant

FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

DOUGLAS BAILEY,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	Case No. 920819-CA
W.H. BURT EXPLOSIVES, INC., a)	Priority No. 15
New Mexico corporation)	
)	
Defendant/Respondent.)	

APPEAL FROM DIRECTED VERDICT ENTERED IN
THE SEVENTH JUDICIAL DISTRICT COURT OF GRAND COUNTY

The Honorable Boyd Bunnell, Presiding

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Roger P. Christensen, #0648
Stacey L. Hayden, #6567
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, UT 84101
Telephone: (801) 355-3431

Attorneys for Defendant/Respondent
W.H. Burt Explosives, Inc.

Robert H. Copier
Attorney at Law
243 East 400 South, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 531-0099

Attorney for Plaintiff/Appellant

PARTIES TO THE PROCEEDINGS

With one exception, the names of all the parties to the proceedings in the lower court are set forth in the caption of the case on appeal. The exception is the former defendant Apache Powder Company who has settled with plaintiff.

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction under Utah Code Ann. § 78-2a-3(2)(k). Jurisdiction in the Supreme Court prior to transfer was proper under Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUE

The trial court's directed verdict for W.H. Burt Explosives on plaintiff Douglas Bailey's allegation that W.H. Burt negligently failed to provide sufficient warnings concerning the use of safety fuse in blasting operations was proper. From the evidence presented by the plaintiff at trial, there was no reasonable basis from which a jury could conclude that W.H. Burt Explosives had negligently failed to warn plaintiff.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

There are no constitutional provisions, statutes or rules whose interpretation is determinative in this appeal.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

This appeal involves a claim by Douglas Bailey against W.H. Burt Explosives alleging negligence and product liability. Following presentation of Bailey's evidence at trial, the district court, Honorable Boyd Bunnell presiding, granted a directed verdict in favor of W.H. Burt on Bailey's negligence claim. Bailey then voluntarily dismissed his product liability claim against W.H. Burt. The jury subsequently found no defect in the safety fuse in question, and

judgment was entered in favor of the remaining defendant. Bailey filed a notice of appeal.

Statement of Facts

1. Defendant Apache Powder Company is a company engaged in the business of manufacturing and selling explosives.

2. W.H. Burt Explosives, which is headquartered in Moab, Utah is engaged in the business of selling materials used in blasting operations.

3. Plaintiff Bailey is an experienced miner and blaster (with 20 years of experience) and has served as an instructor in teaching mining and blasting in the past. (T. at 277, 288, 320, 322, 436, 442)

4. On August 26, 1986, Bailey purchased from W.H. Burt's store in Davis County, various materials to be used for blasting and mining operations on property claimed by Wallace A. Muir and his family in Duchesne County, Utah. (Exhibit P-6.)

5. Among the materials purchased by Bailey from Burt were items including White's wax safety fuse manufactured by Apache, two boxes of dynamite explosives and one DuPont Blasters' Handbook. (Exhibit P-6.) The DuPont Blasters' Handbook is generally considered to be the "Bible" in the blasting industry as far as instructions and warnings are concerned.

6. On pages 122 and 469 of the DuPont Blasters' Handbook it states that the only appropriate method for lighting multiple charges is ignitor cord. Fuse is appropriate for single charges. On

page 409 of the DuPont Blaster's Handbook at the beginning of the chapter entitled "Blasting Safety," it states that "[t]he slightest abuse or misdirection of explosives may either kill or cause serious injury to yourself or others." It also states that "[a]dditional information can be found in the 'Do's and Don'ts' published by the institute of Maker of Explosives These should be read, understood, and followed by every explosives user." (emphasis added) (Exhibit D-61)

7. Contained in the two boxes of explosives and in the box of caps was a "Do's and Don'ts" pamphlet which included instructions and safety warnings on how to use the explosives purchased. (T. 435-439) (Exhibit D-8)

8. At the time Bailey purchased the explosives from W.H. Burt, he represented to the employee serving him at Burt that he was an experienced miner and blaster. He did not tell Burt how he was planning to use the materials purchased or ask for any advice in using them. (T. 893)

9. Bailey testified at trial that he was very familiar with both the "Do's and Don'ts" pamphlet and the DuPont Blasters' Handbook. (T. 436, 441, 442, 561)

10. After Bailey purchased the supplies from W.H. Burt, the fuse, dynamite and caps were used in blasting operations at the Muir mine by Bailey and the Muirs. (Complaint ¶ 11)

11. On or about September 5, 1986, Bailey cut segments of safety fuse from the fuse purchased from Burt. Bailey then attached

several such segments of the safety fuse to blasting caps and dynamite. The dynamite was placed into approximately 28 different holes drilled into the face of a tunnel in the mine. (Complaint ¶ 11-13)

12. Bailey then lit the fuses one by one while he and Muir were standing in the dark mine with Muir holding a flashlight. (T. 367)

13. In violation of the express instructions and warnings in both the DuPont Blasters' Handbook and the "Do's & Don'ts" pamphlet, Bailey did not use ignitor cord but attempted to light the 28 separate charges by hand. (Complaint ¶ 13)

14. One or more of the initially lit charges went off before he was able to finish lighting all 28, resulting in the death of Wallace A. Muir and injury to Bailey. (Complaint ¶ 14)

15. Once the blasts went off, Bailey rushed outside the mine leaving Muir inside. Marlo Jenkins, who was outside the mine at the time of the blast attempted to go in and save Muir, but Bailey insisted on being taken to the hospital immediately. Wallace Muir was later found dead from injuries caused by the blast. (T. 377-378)

16. Bailey filed a complaint against Apache Powder Company and W.H. Burt Explosives alleging claims of strict liability, breach of implied warranty and negligence as sellers and distributors of the materials utilized in the blasting operations by Bailey. Bailey's main theory (and the only one actually pursued at trial) was that the

fuse (manufactured by Apache and sold by Burt) had burned too fast and was, therefore, defective.

17. On June 15, 1992 Bailey v. Apache Powder Company and W.H. Burt Explosives went to trial before the Honorable Boyd Bunnell in the Seventh District Court of Grand County. Both Apache Powder Company and W.H. Burt Explosives were present as defendants.

18. Although a claim of negligent failure to warn was included in the complaint, the only claim that was actually pursued, either in discovery or trial, was the claim that the fuse manufactured by Apache, and sold by Burt, burned too fast and was, therefore, defective.

19. Contrary to the bold allegations in the complaint, the plaintiffs own explosives expert, Dr. Melvin Cook, conceded on cross-examination that W.H. Burt had done nothing wrong. (T. 244) Plaintiff himself a miner with 20 years experience, testified that the method he used was not dangerous and was proper. (T. 348, 500, 560, 603-607) Plaintiff, therefore, was precluded from claiming that Burt had a duty to warn him against using a safe and proper method.

20. It was undisputed that Burt had not altered the fuse, but had sold it in exactly the same condition as it had been received from Apache.

21. No evidence was presented by plaintiff indicating that the practices or customs in the industry or anything else that may have been required by Burt, as a mere seller of the products, to do any more than it did in selling the explosives to Bailey. (T. 655)

In fact, the only witnesses called by plaintiff in presenting his case at trial were Dr. Melvin Cook (an explosives expert) and the plaintiff himself. As noted above, both Dr. Cook (expressly) and the plaintiff (by clear implication) testified that W.H. Burt had done nothing wrong. Plaintiff presented no other testimony nor did he present any other evidence in support of the negligence claims against Burt, but, instead, focused his entire case on his theory of product defect. (T. 655)

22. On June 17, 1992, at the close of plaintiff's evidence, W.H. Burt moved for a partial directed verdict only with respect to the negligence claims, asserting that there was no evidence from which reasonable jurors could find that there was any negligence on the part of W.H. Burt in failing to provide sufficient warnings concerning the use of safety fuse in blasting operations. (T. 644.)

23. In responding to Burt's motion for directed verdict, counsel for plaintiff stated: "We don't think its W.H. Burt, we do think its Apache, and we regret that W.H. Burt has to be here..." (T. 651)

24. The trial court then granted the directed verdict as far as any negligence claims were concerned against W.H. Burt stating that the record showed that warnings were given but no evidence was presented as to what the standard in the industry was of what a reasonable distributor of explosives should have done in warning a customer. The strict products liability and breach of implied

warranty claims against Burt were not dismissed on directed verdict.
(T. 655)

25. Plaintiff then amended his pleadings to delete the strict liability and implied breach of warranty claims against Burt. Plaintiff had identical claims against Apache and, therefore, the claims against Burt were surplus. Accordingly, Burt was dropped as a party, counsel for Burt was excused and Burt was not involved in the rest of the trial. (T. 760-762)

26. The claims against Apache went to the jury and the jury returned with a verdict finding the product manufactured by Apache not defective. (T. 1,143)

27. Bailey now appeals claiming that the directed verdict granted to W.H. Burt on the issue of Burt's alleged negligence in allegedly failing to warn Bailey was improper.

SUMMARY OF ARGUMENT

The trial court's granting of W.H. Burt's motion for a directed verdict was proper because from the evidence presented at trial by plaintiff there was no reasonable basis from which a jury could conclude that W.H. Burt had negligently failed to warn Bailey.

ARGUMENT

I. THE TRIAL COURT'S GRANTING OF A DIRECTED VERDICT ON PLAINTIFF'S NEGLIGENCE CLAIMS AGAINST BURT WAS PROPER.

In order to establish negligence on the part of a party, plaintiff must establish that (1) there was a reasonable duty of care

owed by the defendant to the plaintiff, (2) there was a breach of that duty, (3) that the breach of defendant's duty to plaintiff both actually and proximately caused the injury to plaintiff, and (4) the suffering of damages by plaintiff. Williams v. Melby, 699 P.2d 723, 726 (Utah 1985). The failure to establish any one of the foregoing elements is fatal to a negligence claim. From the evidence presented by Bailey at trial it is clear that not only did plaintiff fail on one of the elements but that there is no reasonable basis from which to conclude that any of the elements of a negligence cause of action could have been found against W.H. Burt.

A. Bailey Failed to Present Any Evidence Establishing a Duty Owed to Bailey on the Part of Burt To Do More Than Burt Did.

The cases are clear and overwhelming authority supports the position that a supplier of a dangerous or defective product need not give a warning to a customer in instances where the danger from the product is obvious or known or the danger is actually known to the customer. 63 Am.Jur. 2d Products Liability § 341 ("There is no duty on the part of a manufacturer or seller to give a warning of a product connected danger where the person who claims to be entitled to the warning actually knows of the danger.") Utah case law supports the majority view. See Schneider v. Suhrman, 327 P.2d 822 (Utah 1958).

The accident in this case occurred while plaintiff was lighting 28 charges, each with separate fuses, by hand. It was simply a matter of the flame in one or more of the earlier lit fuses

reaching the dynamite before he had finished. This risk was not latent, but open and obvious. Even a child playing with firecrackers knows that when the flame reaches the end of the fuse an explosion will occur. It is difficult to imagine a more open and obvious danger.

Certainly this was, or should have been obvious to a miner with 20 years experience working with explosives. This is not a case of an unsuspecting plaintiff being caught unawares by a hidden danger. Plaintiff had very extensive knowledge and experience using the alternative ignition methods which allowed the blaster to ignite the charges from a remote and safe position (such as electrical, non-els or ignitor cord), and knowingly determined to light the dynamite by hand while standing directly in the intended blast area.

Under well-established law, Burt had no duty to warn of such an apparent danger.

Our own Supreme Court has found no duty to warn in much more compelling cases than this one. In Schneider, supra, stated:

The Utah Supreme Court in stating the rule on whether a supplier was obligated to warn a customer about possible dangers of a product held that "a supplier of a commodity directly or through a third person is subject to liability to those whom he should expect to use it if the supplier knows of its dangerous potential, knows or reasonably should know that user will not realize the danger, and the supplier fails to use reasonable care to safeguard against danger or to inform user of facts which makes it likely to be dangerous." Id. at 823. (Emphasis added.)

In this case Schneider was a manufacturer of pork sausage. Suhrman, who was a butcher, had been buying mettwurst from the Schneider for quite some time. In the summer of 1955, Schneider informed Suhrman that he could no longer furnish him with mettwurst because his processor would not cool down the ovens enough and as a result the meat was not healthy. Suhrman told the supplier to let him have the mettwurst because he had a oven that would smoke it and take care of the problem. He stated that "what you cannot do, I will complete in my own business." Id. at 824.

Suhrman did not treat the meat effectively and as a result a retail customer contracted trichinosis and filed suit against both Schneider and Suhrman. The jury found that the plaintiff contracted trichinosis from eating the mettwurst purchased from Suhrman as a result of Suhrman's ineffective processing of the meat. However, the trial court refused to enter judgment against the supplier on the charge that the supplier was negligent because he should have known that the mettwurst would be sold without the proper heating to customers. The trial court found no evidence justifying the supplier's lack of due care.

In upholding the trial court's decision to refuse to hold the supplier liable, the Supreme Court stated that the supplier, "could have nothing more than suspicion that Suhrman would sell the mettwurst to the public without correctly processing it. There must be something more substantial than mere suspicion or conjecture upon which to base liability." Id. In essence, the court stated that the

mere suspicion of the supplier that the retailer would sell the meat to the public in an improper manner was not enough to hold the supplier liable for negligence. The supplier had no concrete basis on which to believe that the retailer would negligently sell the meat. Therefore, the supplier was not liable. See also, Baughn v. Honda Motor Co., 727 P.2d 655 (Wash. 1986) (warning need not be given at all instances in which the danger from a product is obvious or known); Long v. Deere & Co., 715 P.2d 1023 (Kan. 1986) (a manufacturer does not have a duty to warn user if the danger is actually known to the user).

In the present case, it was clear from the evidence presented at trial that the danger was or should have been obvious to plaintiff. Bailey testified that he is an extremely experienced miner.

Question by Mr. Copier: How many years have you been in the mining business as a miner?

A. Over 20.

(T. 322)

He also testified that in 1961 he was taught to blast and to mine using several different methods. (T. 277) Bailey has state certification in mining from the state of California where he took 40 hours of course work from a state official on mining. (T. 288) He had sufficient knowledge and experience that he trained other miners in safety methods using the "Do's and Don'ts" pamphlet and held biweekly safety meetings where blasting safety was discussed. (T. 436) He testified that he considers himself to be "a miner and a

good one" and that when he mined in California he was allowed to use his own judgment on what technique to use and when to use it. (T. 319) It was his testimony that he is very much familiar with the "Dos and Don'ts" handbook put out by the Institute of Explosives Manufacturers. (T. 436 and 561) As set forth above, the "Do's and Don'ts" pamphlet specifically warns against using safety fuse lighter when lighting multiple charges.

From Bailey's trial testimony, it is clear that he is an experienced miner, and that knew the safety methods for blasting and what methods would be safe and what methods would be dangerous. He was familiar with the standard industry instruction book stating the dos and don'ts of blasting as well as the DuPont Blasters' Handbook and received both with the materials purchased. His familiarity with these instructions and warnings and his knowledge of safety and mining procedures clearly establishes that the danger in question was, or should have been obvious to him. Therefore, according to established Utah law, W.H. Burt had absolutely no duty to warn Bailey of such known and obvious dangers.

B. Even If a Duty Existed, Bailey Failed to Present Evidence That It was Breached.

1. Even assuming arguendo that there was a duty on the part of W.H. Burt to warn Bailey, W.H. Burt fulfilled that duty by providing written warnings with both boxes of explosives it sold which expressly stated that the method used by Bailey to light the fuses in his blasting was dangerous and should not be used.

According to the invoice provided by W.H. Burt which documents Bailey's purchase of explosives, Bailey purchased two boxes of powder, a box of caps and one DuPont Blasters' Handbook. In both boxes of powder there was a handbook published by the International Manufacturers of Explosives. Bailey himself has testified that in all boxes of explosives the "Do's and Don'ts" pamphlet is included. On page 438 of the transcript, he states the following:

Question by Mr. Draney: All right. Now the next thing we have on our list on this invoice or one of the things we have on the invoice are detonators. I don't know if it's the next thing, but caps. Now, every box of caps also comes the copy of the dos and don'ts, isn't that correct?

A. It certainly does.

Q. Oh, one of the things we forgot that we needed here was a crimper, is that correct?

A. Yeah. Powder crimps.

Q. Powder crimp. All right. Looks kind of like a pair of pliers?

A. Sort of. They open up like pliers.

Q. All right. Now, you said that you have purchased safety-Coaster Sequoia safety fuse before; correct?

A. Yes.

Q. All right, you're familiar with what the box looks like?

A. I guess.

Q. Is that what the box looks like there, plaintiff's exhibit No. 1?

A. Yeah. Close.

Q. And do you see there where it says, attention, before using this fuse read disclaimer of warranty and representation, caution statements inside this carton?

A. Uh-huh.

Q. Do you see that?

A. Sure do.

Q. I believe you told me in your deposition that you opened about ten boxes of fuses over the years, maybe more?

A. How could I count that?

Q. All right.

A. I - -

Q. But you've opened number a number of boxes?

A. I'll say I've opened more than five.

Q. And some of those are Coaster Apache fuse?

A. Yeah.

Q. And inside that, if you buy a whole box, you get a copy of the dos and don'ts; correct?

A. Yes.

In Bailey's own testimony, he states that he purchased boxes of powder, caps and the DuPont Blasters' Handbook. Transcript, page 329:

Question by Mr. Copier: What else did you buy the first time you visited W.H. Burt in North Salt Lake, besides safety fuse?

A. We bought powder and Pril.

Q. And when you say you bought powder -

A. Uh-huh.

Q. - what did that consist of?

A. A box of powder, or two boxes of powder, I can't remember which, that was for the primers.

Q. Was that in sticks?

A. Yes. It was in sticks, yes.

Q. And did you buy anything besides safety fuse, the powder sticks and the Pril?

A. We bought caps, crimps, powder crimps.

Q. Is there anything else you remember buying?

A. And a -

MR. DRANEY: Asked and answered, your Honor.

MR. COPIER: Well, I asked anything else he remembered buying.

THE COURT: Well, go ahead.

THE WITNESS: Say that again.

Question by Mr. Copier: Was there anything else besides what you've already testified that you remember.

A. Powder crimps and bought a - did we get that powder handbook there? I think we bought a safety manual on usage of powder.

From the invoice of Bailey's purchase from W.H. Burt, it is apparent that the safety manual he is referring to is the DuPont Blasters' Handbook.

In the "Do's and Don'ts" pamphlet under the section entitled "Using Explosive Materials: Fuse detonator and Safety Fuse Initiation", the following warnings are given:

LIGHTING SAFETY FUSE.

* * * *

Multiple fuse ignition, ignitor cord with thermolite connectors. (Emphasis added.)

On page 100 of the DuPont Blasters' handbook, safety fuse lighting devices are discussed. On page 101, when discussing thermolite connector and ignitor cord, the DuPont handbook states: "The use of these products as a system for lighting a single charge is strongly recommended." The Blasters' Handbook states "use only ignitor cord with thermolite connectors for multiple fuse ignition." (See p. 469)

Furthermore, on the front of the "Do's and Don'ts" pamphlet, it states:

All explosives are dangerous and must be carefully handled and used following approved safety procedures either by or under the direction of competent, experienced persons in accordance with all applicable federal, state and local laws, regulations and ordinances. If, after carefully reading this entire leaflet, you have any questions or doubts as to how to use any explosive product, do not use it before consult-

ing your supervisor, or the manufacturer if you do not have a supervisor. If you supervisor has any questions or doubts, he should consult the manufacturer before use. (Emphasis added.)

Because W.H. Burt sold all the packages of caps and explosives with the "Do's and Don'ts" pamphlet and also provided Bailey the DuPont Blasters' Handbook with the explosives, W.H. Burt provided more than sufficient warning to Bailey regarding the proper use of explosives. These written instructions were far more complete and effective than any oral comments could have been and more than met any duty on the part of Burt. This is particularly true in light of the fact that the DuPont Blasters' Handbook is generally considered to be the "Bible" of the industry and the "Do's and Don'ts" pamphlets is also a standard in the industry.

On page 122 of the DuPont Handbook under the heading "Multiple Charges" it states that "when lighting more than one fuse and cap assembly, it is necessary to finish lighting the fuse and reach a safe area before the charges begin to detonate. This can only be accomplished by using the ignitor and cord system."

(emphasis added.)

There was absolutely no evidence presented that the warnings and instructions provided by the written materials provided to plaintiff by Burt were inadequate.

There was also no evidence presented on the subject of what the industry practices are in this area.

This is significant as common experience certainly does not suggest a duty on the part of the clerk at a store to inquire and

instruct. For example, when a carpenter (or even a layman) buys building materials at a lumber store, the clerk is not expected to inquire as to the intended use and attempt to warn against any potentially unsafe methods that the user may employ. The same is true with respect to guns, automobiles and virtually all other products. The salesclerk is not expected to inquire and instruct, but is free to have the user rely on his own experience, common sense and the written warnings supplied by the manufacturer with the product. If there is a different expectation with respect to a clerk selling explosives, the plaintiff certainly was required to so establish through competent evidence. No such evidence was presented. Jury verdicts cannot be based on conjecture.

2. All of the evidence presented by plaintiff was that the method he used was safe and proper. Accordingly, he could not claim (in opposing the directed verdict) that Burt had been negligent for allegedly not warning him against such method.

The only evidence the jury had heard up to the time of the directed verdict was the testimony of the plaintiff and his expert. Both of them testified that the method used was proper. Accordingly, he presented no evidence that he should have been warned against using such method. Furthermore, his own expert readily conceded that Burt had done nothing wrong.

Question by Mr. Christensen: As far as you aware, is there any evidence that W.H. Burt did something wrong here?

A. No.

(T. 244)

Faced with such admission and lack of evidence the trial court clearly was correct in granting a directed verdict.

C. Plaintiff has Failed to Show that W.H. Burt's Alleged Failure to Warn Bailey to Use Ignitor Cord Instead of Lighting the Dynamite Fuse By Hand Was the Proximate Cause of Bailey's Injuries.

Under Utah law, "the person complaining has the burden of showing a causal connection between negligent conduct complained of and injury to the plaintiff." Sumsion v. Streator-Smith, 132 P.2d 680, 682 (Utah 1943). Utah law defines proximate cause as the cause that "which, in natural continuous sequence, unbroken by efficient intervening cause, produces injury and without which result would not have occurred; it is the efficient cause, the one that necessarily sets in operation factors that accomplish injury." Mitchell v. Pierson Enterprises, 697 P.2d 240, 245-46 (Utah 1985). Furthermore, Utah courts have ruled that even when material issues of fact with respect to defendant's negligence are demonstrated, this alone is not sufficient to preclude summary judgment if there is no evidence that establishes a direct causal connection between the alleged negligence and the injury. Id. at 245.

In the present case, the evidence is clear that even if Burt had orally recommended to him that ignitor cord be used, he still would have used the method which he did use. In fact, from plaintiff's own testimony there is compelling evidence showing that W.H. Burt's alleged lack of warning had nothing to do with the cause of Bailey's injury because even with the benefit of hindsight, and

even after being confronted with the clear prohibitions in the Blasters' Handbook and the "Do's and Don'ts" pamphlet, Bailey still continues to claim that the method he used was the preferable one. In fact, he testified that even knowing what he now knows, he would do the same thing again.

Question by Mr. Christensen: Mr. Bailey, don't you honestly believe that your own carelessness contributed to this accident?

A. No. I do not. I can hold my head up over this. Can the other company?

Q. Don't you feel any responsibility at all for Mr. Muir's death?

A. No. I don't.

Q. And if you had this to do all over again, you'd do the same thing?

A. I would switch fuse companies, yes.

Q. But other than that, you would do the same thing again?

A. I would switch fuse companies is all.

Q. Other than that, you would do the same thing?

A. Yes.

(T. 606-
607)

If something as traumatic as seeing his friend killed and being injured himself (coupled with having his mistakes highlighted by the MSHA investigation and all of the information presented in this case), is not sufficient to persuade him that a different method should have been used, then it defies reason to suggest that a

comment by a clerk at W.H. Burt would have caused him to pursue a different course.

As noted above, he admitted that he was familiar with the "Do's and Don'ts" pamphlet and the DuPont Blasters' Handbook, all of which warned him not to use a hand held lighter when lighting so many fuses. Bailey testified that he was extremely familiar with the Do's and Don'ts Handbook:

Question by Mr. Christensen: And you're certainly not claiming you should have been given more the Dos and Don'ts booklets are you?

A. No. I'm not.

Q. You had plenty of those, didn't you?

A. Yes.

Q. And I've forgotten, yesterday, but it was established as I recall, that you had received more than one copy with the materials you bought at Burt?

A. Yes.

Q. And that was something you were well familiar with anyway?

A. Pretty well, yes.

Q. I'm assuming that because of your long years of experience in explosives, you've passed tests in California -

A. Uh-huh.

Q. - on the dos and don'ts, you've trained other miners and so forth; that you didn't actually sit down after you bought the stuff from Burt and read the dos and don'ts, did you?

A. No. I did not.

- Q. You didn't feel like you needed to?
- A. No, I didn't 'cause I figured I was using a safe method, yes.
- Q. Well, and you figured you already knew that what was in those?
- A. Yes. Pretty well.
- Q. Throughout your career, you've probably read those many, many times, haven't you?
- A. Yes.

(T. 561)

Bailey also testified that the "Do's and Don't" pamphlet is provided in boxes of dynamite and fuse:

Question by Mr. Draney: I believe you told me in your deposition that you've opened about ten boxes of fuse over the years, maybe more?

- A. How could I count that?
- Q. All right.
- A. I -
- Q. But you've opened a number of boxes?
- A. I'll say I've opened more than five.
- Q. And some of those are Coaster Apache fuse?
- A. Yeah.
- Q. And inside that, if you buy a whole box, you get a copy of the dos and don'ts; correct?
- A. Yes.

(T. 438)

Bailey also testified that he knew that the DuPont Blasters' Handbook stated that the ignitor cord method is the only

system that should be used when lighting more than one fuse as was the situation in the present case and still he did not agree with it. (T. at page 500.) Had the Burt clerk expressed a similar notion, it is clear that he would have disagreed with that too.

Question by Mr. Draney: All right. I'd like to read for you a page from the handbook that we've already discussed that was purchased at the time the explosives were purchased, the one that you said you've read before. There is some discussion in there about ignitor cord and ignitor cord connector, everybody see that?

It says ignitor cord. Ignitor cord and ignitor cord connectors are the most convenient and safest means of igniting safety fuse in planned rotation or sequence. The ignitor cord system eliminates the need for trimming the fuse or lighting in rotation. It should be the only system used when lighting more than one fuse. All fuses in the round must be exactly the same length since the rotation of firing depends entirely on the length and burning speed of ignitor cord.

A. That's true.

Q. Let me ask you this question: Do you agree with those statements?

A. Um, Um. . . .

Question by Mr. Draney: Do you agree with that, that the ignitor cord system eliminates the need - excuse me that it is the safest means of igniting safety fuse in planned rotation?

A. No, I don't.

Q. Do you agree with the statement it should be the only system used when lighting more than one fuse?

A. No.

(Emphasis added.) (T. 500)

By way of summary respondent notes that because Bailey was provided with both the DuPont handbook and the Dos and Don'ts brochure at the time he purchased the explosives, he had more than adequate warning. Furthermore, by his own testimony he was very familiar with the "Do's and Don'ts" pamphlet and the DuPont handbook and had even trained other miners using them. Despite his knowledge of the instructions contained within those handbooks, he still violated the warnings given. It is obvious from plaintiff's own evidence at trial that even if Burt had had a duty to make any additional comments, they would have made no difference. He himself testified that he disagrees with the DuPont Handbook (pages 500 and 506), that the method he used to light the fuses was not dangerous and that he had used this method safely in the past (pages 560, 438 and 439); and that he would use the same method again (page 607).

D. Because of the Lack of Any Evidence Presented Establishing the Elements of Negligence on the Part of W.H. Burt, the Question of W.H. Burt's Negligence Should Not Have Been Submitted to the Jury.

Utah law is clear on the fact that "a plaintiff must present sufficient evidence to establish a prima facie case against a defendant in order to have a negligence action submitted for current consideration by the jury; if plaintiff fails to do so, the defendant is entitled to have the verdict directed in his favor." Lindsay v. Gibbons & Reed, 497 P.2d 28, 30 (Utah 1972). In Lindsay, a woman was killed in a motor vehicle collision occurring at the scene of highway construction. Her husband brought an action against the highway construction contractor to recover for his wife's

wrongful death. The defendant moved for a directed verdict at the close of all the evidence offered by the plaintiff and the trial court granted the motion and discharged the jury. The court stated that on appeal from a direct verdict for a plaintiff in a negligence action, the Supreme Court will examine the evidence introduced by the plaintiff to support the alleged negligence of the defendant to determine whether the evidence reveals (when reviewed in the light most favorable to the plaintiff) that the plaintiff has established a prima facie case.

In Lindsay, the court stated that the finding of causation cannot be predicated on mere speculation or conjecture; the matter must be withdrawn from the jury's consideration unless there is evidence from which the inference may be reasonably drawn if the injury suffered was caused by the negligent act of a defendant. The court stressed that jurors may not speculate as to possibilities.

In the present case, it is clear that plaintiff has not established a prima facie case of negligence against the defendant. Plaintiff's own testimony establishes that W.H. Burt had no duty to warn Bailey about the danger as it was obvious, that W.H. Burt did not breach any duty to Bailey because they did provide more than adequate warnings. Finally, plaintiff has failed to establish that W.H. Burt's alleged failure to orally give Bailey a warning to use ignitor cord proximately caused Bailey's injuries. Under Utah law, it would have been error for the trial court to have allowed the jury to speculate on the issue of W.H. Burt's negligence because Bailey

never established a prima facie case. Therefore, the directed verdict granted in favor of W.H. Burt was proper and should be upheld on appeal.

CONCLUSION

The plaintiff should not be allowed to: put all of his evidentiary eggs in one basket at trial (i.e. product defect); present no evidence on an alternative theory which although plead is not pursued; make admissions in testimony and argument essentially conceding that the alternative theory has no merit; put the trial court in a position where it has no reasonable alternative but to grant a directed verdict on the unsubstantiated alternative theory; amend his pleadings so that the alternative theory defendant is not even still a party when the case is submitted to the jury; proceed to verdict with the only theory actually pursued; and then claim trial court error and the right to another trial when the pursued theory fails. Plaintiff has had his day in court, has had his claim fairly heard on the merits and the time has come for an end to this litigation.

DATED this 4th day of November, 1993.

CHRISTENSEN, JENSEN & POWELL, P.C.

By Stacey L. Hayden
Roger P. Christensen
Stacey L. Hayden
Attorneys for Defendants/Appellees
W.H. Burt Explosives, Inc.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of November, 1993,
two true and correct copies of the BRIEF OF APPELLEES W.H. BURT
EXPLOSIVES, INC. were mailed, postage prepaid, to:

Robert H. Copier
Attorney at Law
Attorney for Plaintiff/Appellant
243 East 400 South, Suite 200
Salt Lake City, UT 84111

CHRISTENSEN, JENSEN & POWELL, P.C.

By Stacey L. Hayden
Roger P. Christensen
Stacey L. Hayden
Attorneys for Defendant/Respondent
W.H. Burt Explosives, Inc.

ADDENDUM

Judgment on Jury Verdict, July 8, 1992

H. JAMES CLEGG (A0681)
SHAWN E. DRANEY (A4026)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Apache Nitrogen Products
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

SEVENTH DISTRICT COURT
Grand County

FILED

JUL 08 1992

CLERK OF THE COURT

BY

Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR GRAND COUNTY
STATE OF UTAH

DOUGLAS BAILEY,

Plaintiff,

vs.

APACHE POWDER COMPANY, a New
Jersey corporation, W. H. BURT
EXPLOSIVES, INC., a New Mexico
corporation, and JOHN DOES I-X,

Defendants.

JUDGMENT ON JURY VERDICT

Civil No. 90-5997

Judge Boyd Bunnell

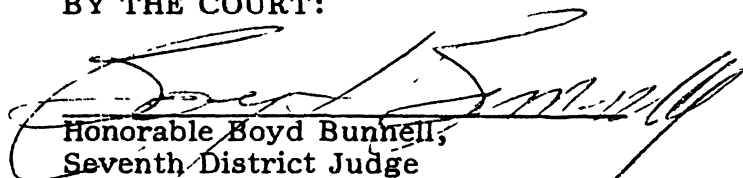
From June 15, 1992, through and including June 19, 1992, this matter came before the court for jury trial. The plaintiff was present and was represented by his counsel Robert H. Copier. The president of Apache Nitrogen Products was present and Apache Nitrogen Products was represented by counsel Shawn E. Draney. The president of W. H. Burt Explosives was present and W. H. Burt Explosives was represented by counsel Roger P. Christensen. An eight person jury was seated. Opening statements were made by plaintiff's counsel and counsel for Apache Nitrogen Products. Counsel for W. H. Burt elected to give an opening statement at the close of plaintiff's case. Plaintiff called witnesses, presented evidence and rested. At the close of

plaintiff's case the defendants moved for directed verdict. Plaintiff voluntarily dismissed his breach of warranty claim. The court granted directed verdict to defendant W. H. Burt Explosives on plaintiff's negligence claim against W. H. Burt Explosives, but denied the motion with respect to the remaining strict liability claim against both defendants. Defendant W. H. Burt's counsel then made an opening statement. Plaintiff then stipulated to dismiss his strict liability claim against W. H. Burt Explosives with prejudice. Defendant Apache Nitrogen Products called witnesses, presented evidence and rested. Plaintiff presented rebuttal evidence. The jury was instructed. Counsel gave closing argument. The jury retired to deliberate and answer special verdict interrogatories. The jury returned a finding of no defect.

NOW THEREFORE, judgment of no cause of action is hereby entered for the defendants and against the plaintiff. Plaintiff's claims are hereby dismissed with prejudice and upon the merits.

DATED this 8th day of July, 1992.

BY THE COURT:


Honorable Boyd Bunnell,
Seventh District Judge

CERTIFICATE OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Gloriann Egan, being duly sworn, states that she is employed in the office of Snow, Christensen & Martineau, attorneys for defendant Apache Powder Company herein; that she served the foregoing:

JUDGMENT ON JURY VERDICT

[In the Seventh Judicial District Court for Grand County, State of Utah, Civil No. 90-5997] on the parties listed below by placing true and correct copies thereof in an envelope addressed to:

Robert H. Copier, Esq.
243 East 400 South, Suite 200
Salt Lake City, Utah 84111
Attorney for Plaintiffs

Roger P. Christensen, Esq.
CHRISTENSEN, JENSEN & POWELL
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Attorneys for Defendant
W. H. Burt Explosives, Inc.

and caused the same to be mailed, first class, postage prepaid, on the 2nd day of July, 1992.

Gloriann Egan
Gloriann Egan

SUBSCRIBED AND SWORN to before me this 2nd day of July, 1992.

Margo D. Colegrove
NOTARY PUBLIC
Salt Lake County, State of Utah

My Commission Expires:

Sept. 19, 1994

